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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DIANA McDOWELL, a single woman, Plaintiff/Appellant, v. JOEL LOPEZ, a single man, Defendant/Appellee.	2 CA-CV 2011-0073 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20087725

Honorable Ted B. Borek, Judge

AFFIRMED

Law Offices of Joseph H. Watson
By Joseph H. Watson
Tucson
Attorney for Plaintiff/Appellant

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By Paul S. Banales
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V Á S Q U E Z, Presiding Judge.

¶1 In this contract action, Diana McDowell appeals from the judgment entered after a jury returned verdicts in favor of appellee Joel Lopez. McDowell contends the verdicts on her claims for securities and common law fraud were against the weight of the evidence, and the court therefore erred in denying her motions for a judgment as a matter of law and for a new trial. For the reasons set forth below, we affirm.

Factual and Procedural Background

¶2 We review the evidence in a light most favorable to upholding the jury verdicts. *Hutcherson v. City of Phx.*, 192 Ariz. 51, ¶ 13, 961 P.2d 449, 451 (1998). Lopez was engaged in the business of promoting mixed martial arts (MMA) "cage fighting" events through his limited liability company, Ringside Sports and Entertainment, LLC (Ringside Sports). In early 2007, he was planning a first-of-its-kind MMA event in Sonora, Mexico, called "Se Vale Todo" to be held in October 2007 and was looking for investors. McDowell was introduced to Lopez in April of that year by a mutual friend and McDowell's boyfriend. Around June, Lopez and McDowell discussed her involvement in the event as an investor and partner. Lopez furnished McDowell with a written investment prospectus, which provided that in exchange for her investment she would be entitled to a percentage of the net profits, the size of which would be based on the amount invested. The prospectus included a "Profit Margin and Forecast" that projected receipts in excess of $200,000 for a sell-out crowd at the arena.

¶3 Although Lopez prepared a written agreement for McDowell's anticipated investment of $10,000, McDowell refused to sign it because she instead had decided to invest $20,000 for a larger percentage of the profits. The parties never signed a written

agreement regarding McDowell's initial $20,000 investment or the additional $16,737 she contributed after the event to pay the fighters. The event was not a financial success and, as a result, McDowell received very little return on her investment. The parties nevertheless discussed working together on future events, and Lopez added McDowell as a manager/member of Ringside Sports. However, Lopez terminated the company approximately one year following the event, after McDowell stated she would make no further investments.

¶4 McDowell filed this action in November 2008, asserting claims of breach of contract and constructive fraud and requesting a partnership accounting. The case was referred to compulsory arbitration pursuant to Rule 4.2, Pima Cnty. Ct. Loc. R. P., and Rule 72, Ariz. R. Civ. P. Following a hearing, the arbitrator ruled in favor of McDowell, finding that the investment agreement constituted a security and that Lopez had committed securities fraud in the process of soliciting McDowell's investment. Lopez appealed the arbitration award to the superior court pursuant to Rule 77(a), Ariz. R. Civ. P., and requested a jury trial. McDowell subsequently was permitted to file an amended complaint that included claims of securities fraud and common law fraud in the sale of securities. The matter proceeded to trial, and the jury found in favor of Lopez on all counts. The trial court denied McDowell's motions for a judgment as a matter of law and new trial, and this appeal followed. We have jurisdiction pursuant to A.R.S. § 12-120.21(A)(1).

Discussion

¶5 A trial court properly may grant a motion for a judgment as a matter of law if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Ariz. R. Civ. P. 50(a). We review de novo the denial of a motion for a judgment as a matter of law, *Warne Invs., Ltd. v. Higgins*, 219 Ariz. 186, ¶ 33, 195 P.3d 645, 653 (App. 2008), and review a ruling on a motion for a new trial for an abuse of discretion, *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). As to both, we will affirm the judgment "if any substantial evidence could lead reasonable persons to find the ultimate facts sufficient to support the verdict." *Id.*

¶6 McDowell maintains "[t]he trial court upheld a jury verdict in the face of a clearly defined investment contract," and Lopez violated Arizona securities law by failing to disclose certain material facts when he solicited the investment from her. Whether an investment qualifies as a security is a question of a law we review de novo. *Vairo v. Clayden*, 153 Ariz. 13, 18, 734 P.2d 110, 115 (App. 1987); *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n*, 194 Ariz. 104, ¶ 14, 977 P.2d 826, 829 (App. 1998). "Our determination of the law, however, must be based on the facts determined by the factfinder." *Nutek*, 194 Ariz. 104, ¶ 14, 977 P.2d at 829; *see Great W. Bank & Trust v. Kotz*, 532 F.2d 1252, 1255 (9th Cir. 1976) ("[I]t is clear to us that in appropriate circumstances a properly instructed jury can determine whether as a matter of fact a disputed instrument is or is not a 'security.'").

¶7 In Arizona, the definition of security includes "investment contracts." A.R.S. § 44-1801(26). And, pursuant to A.R.S. § 44-1991(A), it is fraudulent and unlawful to do any of the following in connection with an offer to sell or buy securities:

> 1. Employ any device, scheme or artifice to defraud.
>
> 2. Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.
>
> 3. Engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit.

¶8 First, we must determine whether the parties' agreement in this case constitutes an investment contract under the three-prong test developed by the United States Supreme Court.[1] "It requires (1) an investment of money, (2) in a common enterprise, (3) with the expectation that profits will be earned solely from the efforts of others." *Vairo*, 153 Ariz. at 17, 734 P.2d at 114, *citing Sec. & Exch. Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946). Here, there is no question McDowell invested money, and the parties apparently do not dispute their arrangement amounted to a common enterprise.[2] We therefore turn our attention to the third prong of the test—

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[1]"The definition of security in A.R.S. § 44-1801[(26)] is substantially similar to its definition in the Securities Act of 1933 and the Securities Exchange Act of 1934." *Vairo v. Clayden*, 153 Ariz. 13, 17, 734 P.2d 110, 114 (App. 1987), *citing Rose v. Dobras*, 128 Ariz. 209, 211, 624 P.2d 887, 889 (App. 1981). "Arizona courts look to federal law for guidance in interpreting its securities law." *Id.*

[2]A common enterprise exists where there is "vertical commonality" or "horizontal commonality." *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 565, 733 P.2d 1142, 1148 (App. 1986). "Horizontal commonality requires that a pooling of funds collectively managed by a promoter or third party take place, while vertical commonality requires a

whether McDowell made the investment with the expectation profits would be earned solely from Lopez's efforts.

¶9 In determining whether that was the case, we discard form in favor of substance and place emphasis on the economic reality of the investment. *Rose v. Dobras*, 128 Ariz. 209, 212, 624 P.2d 887, 890 (App. 1981). The "efforts of others" must be "'those essential managerial efforts which affect the failure or success of the enterprise.'" *Id.*, *quoting Sec. & Exch. Comm'n v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973). And, because McDowell refused to sign the contract Lopez had prepared, we look to the nature of the parties' relationship after the investment was made to determine their intent. *Slevin v. Pedersen Assocs., Inc.*, 540 F. Supp. 437, 441 (S.D.N.Y. 1982). McDowell offers little argument on this issue.[3] She asserts that her only contribution to the project was money and hanging up posters and, thus, she had an expectation that she "would earn a profit through the efforts of others." Lopez responds that the parties actually were "involved in extensive discussions regarding the [event]" and "were working together along the way." He thus characterizes the relationship as a joint venture. We agree with Lopez.

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positive correlation between the success of the investor and the success of the promoter without a pooling of funds." *Vairo*, 153 Ariz. at 17, 734 P.2d at 114, *citing Daggett*, 152 Ariz. at 565, 733 P.2d at 1148. "In Arizona, satisfying either commonality test satisfies the common enterprise test." *Id.*, *citing Daggett*, 152 Ariz. at 566, 733 P.2d at 1149.

[3]Indeed, with the exception of two sentences in her opening brief, McDowell focuses entirely on her argument that Lopez committed securities fraud by failing to disclose material facts concerning the solvency of Ringside Sports and prior events and by misrepresenting the projected profits for the "Se Vale Todo" event.

¶10 The Securities Act of 1933—from which the Arizona act was derived—"was not intended as a protection for those able to fend for themselves." *Butler v. Am. Asphalt & Contracting Co.*, 25 Ariz. App. 26, 29, 540 P.2d 757, 760 (1975). Rather, the primary purpose of the securities laws "was to eliminate serious abuses in a largely unregulated securities market." *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975). However, general partners and joint venturers usually "have enough control over their business entities that the third prong of the . . . test does not apply to them."[4] *Nutek*, 194 Ariz. 104, ¶ 19, 977 P.2d at 830. "An investor who asserts that a general partnership interest constitutes an investment contract and therefore a security 'has a difficult burden to overcome.'" *Id., quoting Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981). "The spirit of the investment contract definition . . . was not meant to encompass an oral agreement between friends to pioneer a market and closely follow the progress of the project." *Slevin*, 540 F. Supp. at 441. And the trial court properly instructed the jury that "[a]n agreement or contract to invest is not necessarily an 'investment contract' within the meaning of the securities laws."

¶11 Here, there was sufficient evidence for the jury to find that McDowell was more than a mere passive investor with the expectation of earning profits solely through

[4]In *Nutek*, this court determined that interests in limited liability companies can be securities and such interests do not benefit from the presumption that interests in general partnerships and joint ventures are not securities. 194 Ariz. 104, ¶ 30, 977 P.2d at 833. We stated that corporate form can be important, because "[i]n determining the level of investor control we look at both legal and practical control." *Id.* ¶ 22. However, because McDowell did not become a member of Ringside Sports until a year after she made her investment, we consider the parties' actions after the investment as the primary indication of their agreement.

Lopez's efforts. At trial, when she was asked to describe the parties "deal" at the time she made the investment for the event, McDowell described their relationship as a partnership, not only in the event, but also in Lopez's business and in potential future events. Lopez testified that the day after McDowell had made her initial $20,000 investment, she sent him an e-mail with suggestions about, among other things, obtaining vendors for the event and advertising in a Mexican newspaper. McDowell acknowledged that Lopez had responded favorably to her suggestions. McDowell also acknowledged she had been aware that she was taking a risk when she made the investment and that Lopez had never guaranteed—only implied—the event would turn a profit. To the extent McDowell asks us to reject this evidence in favor of the contradictory evidence she presented at trial, we will not "'reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or [reached different] conclusions.'" *Hutcherson*, 192 Ariz. 51, ¶ 27, 961 P.2d at 454, *quoting Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944).

¶12 In short, the jury reasonably could have found in favor of Lopez on McDowell's securities fraud claim because it determined that the parties' agreement did not constitute an investment contract and thus was not a security, or that Lopez did not commit any of the acts constituting securities fraud under § 44-1991, or both. And, having concluded the evidence was sufficient for the jury to determine that her investment was not a security, we need not reach McDowell's argument that Lopez committed securities fraud under § 44-1991. "We will 'uphold a general verdict if evidence on any one count, issue or theory sustains the verdict.'" *Mullin v. Brown*, 210

Ariz. 545, ¶ 24, 115 P.3d 139, 145 (App. 2005), *quoting Murcott v. Best W. Int'l, Inc.*, 198 Ariz. 349, ¶ 64, 9 P.3d 1088, 1100 (App. 2000). The trial court therefore did not err in denying McDowell's motion for a judgment as a matter of law or her motion for a new trial on her claim for securities fraud.

¶13 Next, McDowell contends "[t]he matter should be remanded on the common law claim for securities fraud and for breach of contract." Because she does not develop these arguments sufficiently for appellate review, we do not consider them further. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (failure to develop and support argument constitutes waiver on appeal); Rule 13(a)(6), Ariz. R. Civ. App. P. (appellant's brief "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on").

Attorney Fees

¶14 Both parties have requested an award of attorney fees on appeal pursuant to A.R.S. § 12-341.01. In our discretion, we decline to award attorney fees. Lopez, however, is entitled to recover his taxable costs upon compliance with Rule 21(a), Ariz. R. Civ. App. P.

Disposition

¶15 For the reasons set forth above, we affirm.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge